

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

Signed

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SID FARBER and NADIA FARBER,

Appellants

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

ON APPEAL FROM THE DECISION OF
THE UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE



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STATEMENT OF THE ISSUE PRESENTED

Whether the Tax Court correctly determined that an oil painting entitled "Susanna" had a fair market value of \$10,000. at the time taxpayers gave it to a qualified charity.

STATEMENT OF THE CASE

This is an income tax case involving approximately \$72,500 in taxes for the years 1966 and 1967. (R. A7.)^{1/} The Tax Court filed its memorandum findings of fact and opinion on June 17, 1974 and entered its decision on October 16, 1974. (R. A5, A16-A27.) Taxpayers filed their notice of appeal on January 8, 1975. (R. A5.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

1/ "R." references are to the separately bound record appendix.

The relevant facts are not in dispute and may be summarized as follows:

On December 29, 1966, Sid and Nadia Farber (taxpayers) donated the painting here in issue, entitled "Susanna," to Hofstra College. (R. A17.) Because the college qualified as an educational organization, contributions in the form of gifts made to the college were deductible up to 30 percent of the donors' adjusted gross income and were subject to the Internal Revenue Code's carryover provision for charitable contributions (Section 170(d)). Taxpayers valued the painting at \$150,000 and claimed deductions of \$79,264.60 and \$70,735.40 in 1966 and 1967, respectively. The Commissioner determined that the painting had a fair market value of \$2,000 at the time of the gift and determined deficiencies in tax accordingly. (R. A17-A18.)

Taxpayers claim that "Susanna," an oil on canvas, is an original painting by the famous Sixteen Century Italian master, Jacopo Robusti, who was known as Tintoretto. Tintoretto was a prolific artist who is known to have painted with assistants. The studio which he maintained during his lifetime, remained in operation after his death under the management of his son.

It was stipulated by the parties that the canvas on which the "Susanna" was painted was of the age in which Tintoretto lived, i.e., the late Sixteenth Century. The painting which was not signed--but Tintoretto rarely signed his work--suffered substantial damage over the years which in part was restored as

is customary with old paintings. (R. A18.) Much of the restoration, however, was of poor quality. (R. A29.)

One of Tintoretto's most famous paintings, "Susanna and the Elders," currently hangs in the Kunsthistorisches Museum, Vienna. To the untrained eye, the figure of Susanna in the present painting and in the Vienna painting are anatomically identical in both appearance and pose but the paintings in all other respects are different. Tintoretto was known to have painted "Susanna" several times in different positions. (R. A19.)

Taxpayers introduced no evidence relating to the circumstances under which they purchased the painting, how much they paid for it or the value they placed upon it for insurance purposes prior to the time they gave it to Hofstra College. (R. A21.) With the exception of taxpayers' deposed witness, none of their experts ever heard of the painting before the instant litigation. The deposed witness first heard of it when the taxpayers exhibited it along with other paintings in Italy in 1964. (R. A23.) Furthermore, no evidence was introduced bearing on the location or ownership of the painting prior to the time taxpayers acquired it, nor has there ever been any mention of the painting in any art literature or catalogs. (R. A18, A23.)

The sum of the taxpayers' evidence consisted of: (1) a witness (Mariacher) who was deposed through written interrogatories and cross-interrogatories; (2) a valuation expert--Mrs. Bartholet; (3) a valuation-authentication expert--Mr. LaMarre; and (4) five letters of endorsement (expertises) from European

art experts, four of which were executed in 1928 (one reaffirmed in 1970) and one in 1949. (R. A22.) Neither Mrs. Bartholet nor Mr. LaMarre had ever bought, sold or appraised a Tintoretto painting before. (Tr. 16, 63.)^{2/} Mr. Bartholet's valuation of \$200,000 was grounded on the assumption that the painting was an authentic Tintoretto. (R. A42-A45.) She felt the assumption was warranted because taxpayers' other experts (deposed witness and testimonials contained in the five letters of endorsement) said the painting was authentic. (Tr. 36-37.) Mr. LaMarre also premised his valuation of \$250,000 on the assumption that the painting was authentic. His opinion that it was authentic was based upon "his ability to see the difference between a Tintoretto or a contemporary work by a lesser artist" and upon the opinions of the letters of endorsement. (Tr. 72-73.)

The Commissioner presented two expert witnesses, Professor Kathleen Posner and Bert C. Horton. Professor Posner testified that while there were stylistic and technical differences between the present painting and an authenticated Tintoretto, "Susanna and the Elders," (Tr. 82) she was unable to state with certainty whether or not Tintoretto had been at all involved in the original production of the present picture because of the damage the picture had suffered (Tr. 95-96):

Q. Is the subject painting in your opinion by the hand of Tintoretto?

2/ "Tr." references are to the transcript of proceedings below.

A. I don't know whether I can answer that by a yes or no, because I would say that the adventures that this painting has undergone since the time when it was done, make it extremely difficult to say or rather to conclude negatively that Tintoretto never put his hand to it. I would say that as it is now, I see no indication that Tintoretto's hand was involved in this painting.

Q. And, what is your opinion as to the condition of the subject painting?

A. I would say that it's [sic] condition was sufficiently damaged to make it extremely difficult to draw conclusions about it. I would say that it has suffered a good deal in important ways.

Mr. Norton testified (Tr. 149) that the painting had a fair market value in the neighborhood of \$2,000. He based this appraisal upon his opinion that the painting had not been painted by Tintoretto and upon his assessment of the damage the original painting had suffered. Mr. Norton examined the painting with the aid of an ultraviolet light in the court room. (Tr. 141-145.) This examination and the other evidence of record showed, the court found (R. A18; Tr. 145), that substantial portions of the painting had been restored.

The Tax Court found that the painting had a fair market value of \$10,000 at the time taxpayers had given it to the university. The court noted that taxpayers had failed to introduce any evidence as to the price they paid for the painting or the value they or Hofstra placed upon it for insurance purposes. It further noted that the expert testimony presented to the court was in conflict both as to the authorship of the painting and as to its condition.

Finally, the court pointed out the absence of definitive testimony as to the sales price of comparable paintings. The court stated that it did not find it necessary to pass finally upon the question whether the painting was an original Tintoretto. It merely noted that there was sufficient doubt as to its authenticity as to act as a "serious depressant on market value." (R. A20-A27.)

Taxpayers appeal.

SUMMARY OF ARGUMENT

The sole issue presented in this appeal concerns the fair market value of an oil painting entitled "Susanna" which the taxpayers contributed to Hofstra College in 1966. The ultimate extent of taxpayers' charitable contribution deduction with respect to that painting, of course, hinges upon this determination. The Tax Court found that the painting had a fair market value of \$10,000, a finding which may not be overturned unless clearly erroneous. We submit that, far from being erroneous, this finding is correct and should be sustained on appeal.

There is substantial evidence to support the Tax Court's valuation. To begin with, the Tax Court properly adjusted the fair market value of the present painting to reflect the substantial doubts as to its authorship. The evidence below revealed that it was by no means certain that the painting had been done by the hand of Tintoretto. Taxpayers introduced "expertises," four of which were written by art experts during 1928, and also introduced the responses to interrogatories given

by another art expert and presented the testimony of an art expert in support of their claim that the painting was an original Tintoretto. However, the Commissioner introduced testimony by two art experts which directly contradicted taxpayers' proof. And the Tax Court properly found that this contrary proof raised substantial questions as to the painting's authorship. This testimony showed that there were stylistic and presentational differences between the present painting and other Tintorettos. It further pointed out that the present painting had been damaged and that the subsequent restoration work had gone far to disguise the original painter's work. Finally, this testimony cast real doubt upon the validity of the "expertises" introduced by taxpayers. These testimonials, the Commissioner's expert art historian testified, were much more easily obtained prior to the end of World War II. And scholarship subsequent to the date of most of the "expertises" had shown that a number of the works previously attributed to Tintoretto had not been painted by the master.

By the same token, the evidence at trial indicated that the present painting had been damaged prior to the date of gift. The evidence as to the extent of damage, while conflicting, fully bears out the Tax Court's finding that the damage it had sustained was substantial. Moreover, much of this damage had been suffered by the compositionally important portions of the painting, such as the subject's face and torso. Clearly, the evidence of such damage would adversely affect the painting's value.

Finally, there was evidence that sometime subsequent to its creation, someone had attempted to restore the painting, but that the quality of this restoration work was of an inferior nature. Indeed, even taxpayers' expert conceded that a "restored" chin line had been badly done.

These three factors, then, combined to compel the Tax Court to value the present painting at a lower level than it might have found appropriate for a fully authenticated, well-preserved Tintoretto. There is evidence in the record that authenticated Tintorettos had been sold in the years subsequent to the date of gift for from \$13,000 to \$23,000. Clearly, the \$10,000 valuation the Tax Court placed on the present painting cannot be considered unreasonable. That valuation should be sustained on appeal.

Taxpayers attack the finding below on essentially two grounds, that the Tax Court failed to make allegedly essential findings as to the authorship of the painting and that it improperly assessed the evidence presented to it. Neither of these arguments has merit. The Tax Court was not obliged to enter a finding as to authorship of the painting, but was obliged only to place a value on the painting as of the date of gift. As taxpayers argue, the identity of the painter who created a work affects its value. Equally, uncertainty as to authorship affects value. By noting the substantial questions as to the identity of the author of the present work and adjusting its valuation of the painting to reflect these uncertainties

of authorship, the Tax Court has fully carried out its function.

The Tax Court also correctly carried out its function of weighing the evidence presented to it. All its findings are supported by substantial and credible evidence in the record below. That taxpayers wish the Tax Court had found their own evidence more compelling does not provide a basis for reversal.

ARGUMENT

THE EVIDENCE OF RECORD FULLY SUPPORTS THE TAX COURT'S DETERMINATION OF THE FAIR MARKET VALUE OF THE PAINTING DONATED BY THE TAXPAYERS

The only question at issue in this appeal concerns the correctness of the Tax Court's finding of the fair market value of an oil painting for purposes of computing the allowable charitable contribution deduction under Section 170(a)(1) of the Internal Revenue Code of 1954, Appendix, infra. To determine the amount of the deduction, Section 1.170-1(c) of the Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.), Appendix, infra, provides, in part, as follows:

(c) * * * (1) General Rules. If a contribution is made in property other than money, the amount of the deduction is determined by the fair market value of the property at the time of the contribution. * * *

With respect to the definition of "fair market value," the Regulations continue:

The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts. * * *

Questions of value are matters of judgment, and necessarily involve approximations based on those factors brought before the trial court which would reasonably bear on the determination of a price to which a willing buyer and willing seller would agree. See generally, Rev. Proc. 66-49, 1966-2 Cum. Bull. 1257. Accordingly, determinations of value are heavily factual in nature. Indeed, determinations of value have sometimes been characterized as matters of "pure fact." Hamm v. Commissioner, 325 F. 2d 934, 938 (C.A. 8, 1963). Such factual determinations may not, of course, be overturned on appeal unless clearly erroneous.^{3/} Estate of Brown v. Commissioner, 425 F. 2d 1406 (C.A. 5, 1970); Goldman v. Commissioner, 388 F. 2d 476 (C.A. 6, 1967); Cooley v. Commissioner, 33 T.C. 223, aff'd, 283 F. 2d 945 (C.A. 2, 1960). As this Court stated in Webster Investors Inc. v. Commissioner, 291 F. 2d 192, 194, in affirming a finding of value by the Tax Court:

The law is clear that this Court must allow the finding of fact of the Tax Court to stand unless it is clearly erroneous, and the reviewing court is "left with the definite and firm conviction

3/ Under Section 7482(a) of the Internal Revenue Code of 1954, Appendix, infra, decisions of the Tax Court generally are reviewed to the same extent as decisions of the District Courts in civil cases tried without a jury. Rule 52 of the Federal Rules of Civil Procedure provides, in part, as follows:

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the ~~w-t-~~ nesses.

that a mistake has been committed." United States v. United States Gypsum Co., et al., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L. Ed. 746; Commissioner v. Duberstein et ux., 363 U.S. 278, 291, 80 S.Ct. 1190, 4 L. Ed. 2d 1218.

Indeed, even where credible evidence exists which would support a contrary finding, a finding of value made by a trial court must be upheld on appeal if it is supported by substantial evidence and is therefore not "clearly erroneous." Commissioner v. Duberstein, 363 U.S. 278 (1959); Ushco Mfg. Co. v. Commissioner, 151 F. 2d 821 (C.A. 2, 1945), Hamm v. Commissioner, supra; Anchor Co. v. Commissioner, 42 F. 2d 99 (C.A. 4, 1930). Moreover, because the valuation of property depends to a great extent on the weight and credibility to be given to conflicting evidence, this Court has repeatedly held that its powers of review are "particularly narrow" when the issue is one of value and that it will not upset a lower court's appraisal even though the value set differs from that which this Court would have fixed. Sisto Financial Corp. v. Commissioner, 149 F. 2d 268 (C.A. 2, 1945); Rogers v. Helvering, 107 F. 2d 394 (C.A. 2, 1939).

The painting here at issue, entitled "Susanna," was given by taxpayers to Hofstra College in 1966. They computed the charitable deduction they were entitled to claim on account of the gift on the basis that the painting was worth \$150,000. The Commissioner determined that the fair market value of the painting at the date of gift was \$2,000 and determined a deficiency accordingly. That determination was, of course, presumptively

correct and taxpayers bore the burden of proof below. Helvering v. Taylor, 293 U.S. 507 (1935). The Tax Court found that the painting had a fair market value of \$10,000 as of the date of gift.

The record below fully bears out the Tax Court's determination of value. Principally, three factors which emerge from this record dictated this determination. The uncertainty as to authorship disclosed by the record, the evidence of damage to the painting shown both by an ultraviolet examination of the picture and by the testimony of witnesses and the proof as to the inferior quality of restoration work done on the painting clearly necessitated valuing the painting at a substantially lower figure than that urged by the taxpayers.

The evidence as to authorship of the painting was, to be sure, conflicting. On the one hand, taxpayers presented "expertises" from five European art experts, interrogatories answered by a sixth European and the live testimony of John LaMarre, an appraiser and teacher, all tending to show that the present painting had been painted by Tintoretto.^{4/} On the other, the Commissioner presented two expert witnesses, both of whom disputed taxpayers' claim that the painting was a true Tintoretto. While the Tax Court found it unnecessary to resolve the dispute as to authenticity--the court found it sufficient for present ^{4/} Taxpayers also introduced testimony by Mrs. Elizabeth Ives Bartholet. Her testimony, however, was limited to valuation.

purposes to note the substantial nature of the dispute and to account for depressing effect such a dispute would have upon the market value of the painting in its calculations (R. A26-A27)--we submit that the weight of the testimony favors the Commissioner's experts. Taxpayers placed primary reliance on the five expertises they introduced into evidence. ^{5/} Indeed, their live witness ^{6/} on authenticity, LaMarre, testified (Tr. 73) that his own evaluation was based in part upon the "expertises."

5/ Taxpayers argue that, because the "expertises" were documentary evidence, this Court can review the "evidence" they present *de novo*. They further urge that this Court should accord these "expertises" more weight than did the court below. We submit that these unsworn declarations constitute mere hearsay and should not be allowed to overcome live testimony. In any event, even if this Court were to conduct an independent evaluation of the "expertise" evidence, taking into account the age of the attributions, the circumstances surrounding their execution, the depth of investigation conducted by the authors and most importantly, the undisputed testimony of the eminently qualified Government witnesses concerning the doubtful reliability of those opinions today, we submit that this Court would have no choice but to reach the same result as the Tax Court.

6/ Professor Giovanni Mariacher, who testified on written interrogatories, also testified that the subject painting was a Tintoretto (R. A68 (response to interrogatory 18)), but admitted (R. A69 (response to cross-interrogatories 6 and 7)) that he could not remember when or where he first saw the painting, or how long he took to inspect it. He knew nothing about the painting's background nor had he seen it listed in any art publications (R. A72 (response to cross-interrogatories 38 and 41)). Clearly, his opinion of authenticity was based more on the attributions of four of the five expertises in evidence than on any in-depth examination of the painting. (See R. A72-A73 (response to cross-interrogatory 41.)) This testimony, moreover, consisted generally in conclusory statements which could provide little aid to the court in resolving the instant issue. And the testimony as a whole was rendered suspect by Mariacher's refusal to answer several clearly material and relevant questions propounded by the Government (R. A69 (response to cross-interrogatories 1, 11 and 12)) and his less than candid response to certain questions propounded by the Government concerning an article he had written on the painting at the request of the taxpayers. Compare R. A69 (response to cross-interrogatories 1 and 4) with R. A14; R. A23, fn. 3.)

But the Government's witnesses placed the validity of the "expertises" in question. Professor Posner testified as to the "expertises" (Tr. 88-90):

A * * * What they tell us is that at the date of the writing the writers had seen in most cases a photograph of this painting, and so--

Q And, are you familiar with the individual signing these endorsements, or who executed these endorsements?

A Yes, I know their names, but I have not met any of them.

Q Now, with regard -- you have been furnished previously with statements -- statements which are contained in Exhibit 5-E, and did you not[e] any comparisons made by the authors with known works of Tintoretto?

A Yes, they all make comparisons with the Vienna picture, which is indeed the most closely related in subject, but on at least one occasion, one of the experts related the picture or discussed the picture in terms of other [works] * * * by Tintoretto, which are not accepted in the catalogue of Tintoretto's works today.

Q I see, so in your opinion, would you -- is it your opinion that the comparisons made by the authors of these statements are valid?

A Not necessarily.

THE COURT: What does that mean?

THE WITNESS: Ah -- what it means is that they don't really allow you to come to conclusions about the nature of the picture that we are discussing.

THE COURT: You mean you can't be sure of what they say?

THE WITNESS: That is certainly so, that you cannot be sure of what they say. But the comparisons that they make, since they are sometimes made with

paintings not believed to be by Tintoretto, don't give you very good conclusions about the picture we are discussing.

By MR. HOLLY: (Resuming)

Q With regard to Exhibits 5-E through 9-I, would you refer to them again, with regard to the dates upon which they were executed?

A I understand that most of them are in 1928.

* * * *

Q Well, what if you know was the custom in the particular field during 1928 regarding the issuance of certificates of endorsement?

* * * *

A I see -- I see. Well, the custom of writing expertises was of course very much in vogue then, and not only in those years, but in the time span that you are suggesting but in this period generally. At that time scholars indeed very often gave expertises of this kind to paintings. And, at the same that it has to be understood in relation to the fact that attributions generally to old masters such as Tintoretto were a good deal generally generous and looser than they are now.

As a rule today -- let's say since the Second World War, or let's say in the last decades, people are, I think, tend not -- or to write fewer expertises, and to be less generous than they used to.

* * * *

And Professor Posner's other testimony cast further doubt as to whether the painting had been done by Tintoretto (Tr. 81-82, 84-85, 93-94):

* * * *

Q And, would you describe the differences between the Vienna painting and the subject painting which you have before you?

A Well, the principal difference is that the Vienna painting has more figures, and continues onward to the left, this is -- the central -- well, let's say the most important figure taken from the painting, there's a difference in subject matter, let's say, or in presentation of the subject rather, but there are to my view also notable differences in style, and I should say that this painting on inspection seems to lack precisely the vivacity and the freedom of brush stroke and of style of interpretation that characterized paintings like the Vienna Susanna, and which I actually don't see here.

* * * *

Q Does your study indicate that Tintoretto dealt with the same subject more than once?

A Yes, he did. He dealt for instance with the subject of Susanna and the Elders on at least five occasions. But, that is the subject like the Adoration of the Magi, it can be treated in any number of ways. It simply has to show the character of Susanna and the Elders.

Q Is the subject painting in your opinion an example of his handling of the same subject in any way?

A I'm not sure. As I understand your question, I would say no, this wasn't an example of his handling of the theme, I would say that this closely reproduced one such handling, namely the one in Vienna, perhaps I could clarify by saying that I don't really know on any occasion upon which Tintoretto treated the same theme in exactly the same way twice. 7/

There are however, occasions where a theme is -- has been reproduced or commented upon by students or other people.

Q In your opinion, in what way does the subject painting which you have before you, differ from known authenticated works by Tintoretto?

7/ Interestingly, taxpayers' witness, LaMarre, testified that he measured the figure of Susanna in the instant painting and that it "coincided exactly with [the measurements of] the Susanna in Vienna." (Tr. 54.) Professor Posner pointed out, however, that such a micrometer exactness would suggest a copying technique which a student, rather than a master, would employ. (Tr. 82-83, 85-86.)

A Well, most particularly in very close resemblance to a known painting by Tintoretto, and then also in terms of its characteristics of style that we spoke about shortly before.

* * * *

Q Does the subject painting have any other unusual features that should be brought to the attention of the Court?

A Well, in relation to the painting in Vienna, it seems -- how should I put it, to misunderstand some of the portions of the anatomy.

Q Would you point out what you have reference to, say it?

A Now, here again, my testimony has to be seen in the light of the fact that I cannot always distinguish simply standing here between differences that come from restoration and differences in the original painting. Here in the hand for instance, if you will take a look at it, you will see that what is meant to be a foreshortening is in fact seen extremely awkwardly [sic], and it is very hard to read it, and there is no thumb here, for instance, whereas in the original painting you do see a piece of that, and where the foreshortening -- is understood --

THE COURT: Which original painting, do you mean the one in Vienna?

THE WITNESS: I beg your -- yes, excuse me, in the painting in Vienna. By the way when I say original here, I would say that in any event, this painting had been, by whatever the conclusion you may come to about its authorship, this painting is derived from the painting in Vienna. By the way this goes contrary to a number of expertises, which themselves are entirely contradictory whether this painting -- this figure should be dated before the Vienna picture or afterwards, this is also a sign of uncertainty.

* * * * *

The Commissioner's other expert witness, Mr. Bert Norton, testified that in his opinion the painting was not by the hand of Tintoretto. (Tr. 126-129, 152-154, 165.) He based his opinion

upon (1) a comparison of the present painting with the Vienna Susanna; (2) an X-ray examination of this painting; and (3) his ultraviolet examination of the present canvas. (Tr. 132-137, 143-145, 149.) He further testified and demonstrated with an ultraviolet examination of the painting in the courtroom, that the painting had been so damaged that its date-of-gift value (Tr. 143) had been substantially diminished. He placed this value at \$2,000. (Tr. 149.)

Finally, there were certain glaring gaps in the proof adduced at trial, gaps which inevitably place the authorship of the painting in doubt. Taxpayers refused to introduce any evidence as to the circumstances surrounding their acquisition of the painting, the price they had paid for it or the value they had placed upon it for insurance purposes. Indeed, although the importance of painting's provenance--the history of the painting's ownership or location from date of creation to the present--as a means of authentication was noted (Tr. 86-87), taxpayers made no attempt whatsoever to trace the history of this painting back to its putative author, Tintoretto. See Mathias v. Commissioner, 50 T.C. 994, 993-999 (1968).

The record with respect to the condition of the painting here in dispute as of the date of gift presents a similar picture of conflicting testimony. Thus, Mrs. Bartholet testified that damage to the painting was "not particularly" extensive, that the restoration was "probably * * * about what one would expect of any painting of this era" and that the degree of

restoration was "not particularly" extensive. (Tr. 26.) Mr. LaMarre, taxpayers' other live witness testified in a similar vein: That there was "An amazingly small amount of restoration" (Tr. 53), that the amount of restoration was "unusually small * * * , relative to the amount of restoration that is done in comparable works of that period" (Tr. 60) and that damage to the painting was "relatively slight" (Tr. 68). On the other hand, Professor Posner testified (Tr. 92-93):

* * * *

Q And, did you study of this x-ray -- or these x-rays reveal that painting had been damaged?

A Yes, it had been damaged.

Q In your opinion, how would you characterize the damage to the painting, substantial -- or considerable --

A Yes, I would say that it was considerable, but I would say that it was of a variety of kinds as well.

Q Well, would you elaborate on the kinds of damage?

A Well, there are these -- real breaks where the paint has fallen out, as testified to earlier, then there are areas of abrasion too where the painting has been rubbed, and other areas where the pigments that were originally upon the canvas have re-treated back into it, making them difficult to read. The other thing that leads me to say that I think that there is considerable damage to this painting is that the areas of damage are in parts of the painting that are compositionally important. That is to say an area of damage, let's say where there is a little bit of sky on the upper left is not going to compromise the esthetic character of the work as a whole as strongly as damage in the face, for example as we find here, or in the body.

Q Now you have heard, I believe, Mr. LaMarre testify with regard to the face?

A Yes.

Q Now, in your opinion has there been any damage, or had there been any damage to the facial area?

A Yes, there had.

* * * *

And Mr. Norton, the Commissioner's other expert witness, testified that the painting was in "very bad condition," that he could point out "dozens of places" where the picture had been damaged (Tr. 132) and that the conclusion he reached after studying both the painting and the X-rays which had been taken of it, was that the painting was "seriously" damaged.

Again, the weight of the evidence supports the conclusion reached by the Commissioner's experts--that the damage was so substantial that it lowered the canvas' fair market value. Both taxpayers' experts conceded that compositionally important portions of the painting, such as the face (Tr. 28, 53, 68), the hair (Tr. 68), various parts of the subject's torso and back (Tr. 53, 68), and the subject's earring (Tr. 28), had at some time suffered damage.

The ultraviolet examination of the canvas conducted by Mr. Norton in the courtroom further corroborated the testimony as to the extent of damage to the original painting. This examination (Tr. 143-145) revealed that the background in the top right hand corner of the painting and the subject's hair, forehead,

face, right arm, back and shoulder had been restored. See Mathias v. Commissioner, supra.

Finally, while there was again a conflict in the evidence as to the quality of the restoration work done on the painting, the weight of the evidence clearly warrants the conclusion that some of that restoration was of such poor quality that it would lower the painting's fair market value. Taxpayers' expert, LaMarre, testified (Tr. 53) that "the line under the chin is-- is a grayish-blue, badly--a bad piece of restoration * * *." And some of the stylistic aberrations evident in the picture, Professor Posner testified (Tr. 93-94), might have been attributable to restoration efforts.

In sum, then, while there were pronounced conflicts in the evidence below, the Tax Court had ample evidence to warrant the ^{8/} \$10,000 valuation it placed on the present painting. At minimum, the record below makes it clear that there is room for substantial doubt as to the true author of the present painting. In light of those doubts, any "willing buyer" would have demanded price concessions before buying such a questionable painting. Equally, it is clear from the record below that the present painting had been substantially damaged prior to the time of gift. That factor, also, would have an effect on the painting's

^{8/} Indeed, the conflicts in evidence ran even to the sales price of Tintorettos. Taxpayers tried to make much of the \$160,000 sales price for "Christ by the Pool of Bethesda," while Mr. Norton testified (Tr. 150) of sales of authenticated Tintorettos for from \$13,000 to \$23,000 during the years shortly after the gift.

fair market value. Finally, while again there is a conflict in proof, there is ample basis in the record to warrant the conclusion that the restoration work done on the painting was of an inferior quality. Clearly, a damaged, poorly-restored painting of doubtful authorship would command a lower sales price than a properly authenticated painting that had suffered less damage and had been more skillfully restored. There is evidence in the record that authenticated paintings by Tintoretto sold during the years 1963 to 1972 for prices ranging from \$13,000 to \$160,000. (Tr. 150; R. A55.) Given the nature of the evidence concerning this painting, the Tax Court had ample warrant to conclude that its fair market value was considerably less than that of an authenticated Tintoretto. Its ultimate determination that the painting was worth \$10,000 at the time of the gift must be viewed as the product of its reasoned weighing of the evidence here of record. It should be sustained.

Taxpayers, however, make essentially a two-pronged attack upon the Tax Court's decision. They argue, first, that the Tax Court committed reversible error when it failed to make a finding as to the authorship of the painting. They also argue that the Tax Court erred in not according more weight to their experts' testimony. Neither of these arguments has merit.

Taxpayers' argument as to the need for a finding as to authorship is off the mark. To be sure, authorship is an important factor in valuing a painting, but it is important only

because it affects that value, not because it establishes it. And, indeed, the Tax Court took full note of the impact proof of authorship has upon the value of a painting when it noted that the substantial doubt as to authorship of the present painting would have a depressing effect upon its market value. (R. A26-A27.)

Thus, taxpayers' citation of McIninch v. United States, 371 F. 2d 940 (C.A. 5, 1967); Southland Corp. v. Campbell, 358 F. 2d 333 (C.A. 5, 1966); and Marlborough Corp. v. United States, 172 F. 2d 787 (C.A. 9, 1949), as dictating reversal is without merit. To be sure a trial court must make findings on the ultimate issue or, make findings on the essential factual elements upon which its decision is based (O'Neill v. United States, 411 F. 2d 139 (C.A. 3, 1969)), but here the Tax Court made specific "foundation" findings as well as the "ultimate" finding of fair market value. That is all it was required to do.

Taxpayers' second argument, that the Tax Court incorrectly weighed the evidence presented to it, has already been answered in good part. As we have shown, there is substantial evidence of record to support the Tax Court's conclusions below. That taxpayers wish the Tax Court had rejected that evidence in favor of their own, simply does not provide a basis for reversal. Victorson v. Commissioner, 326 F. 2d 249 (C.A. 2, 1964); Sisto Financial Corp. v. Commissioner, supra and Rogers v. Helvering, supra.

CONCLUSION

For the foregoing reasons, the decision of the Tax Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this 14th day of August, 1975, in an envelope, with postage prepaid, properly addressed to him, as follows:

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 170. CHARITABLE, ETC., CONTRIBUTIONS AND GIFTS.

(a) Allowance of Deduction.--

(1) General Rule.--There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary or his delegate.

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SEC. 7482. COURTS OF REVIEW.

(a) Jurisdiction.--The United States Court of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

* * * *

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

§1.170-1 Charitable, etc., contributions and gifts; allowance of deduction (before amendment by Tax Refcrm Act of 1969).

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(c) Contribution in Property--(1) General rules.

If a contribution is made in property other than money, the amount of the deduction is determined by the fair market value of the property at the time of the contribution. The fair market is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts. If the contribution is made in property of a type which the taxpayer sells in the course of his business,

the fair market value is the price which the taxpayer would have received if he had sold the contributed property in the lowest usual market in which he customarily sell, at the time and place of the contribution (and in the case of a contribution of goods in quantity, in the quantity contributed). The usual market of a manufacturer or other producer consists of the wholesalers or other distributors to or through whom he customarily sells, unless he sells only at retail in which event it is his retail customers. If a donor makes a charitable contribution of, for example, stock in trade at a time when he could not reasonably have been expected to realize its usual selling price, the value of the gift is not the usual selling price but is the amount for which the quantity of merchandise contributed would have been sold by the donor at the time of the contribution. Costs and expenses incurred in the year of contribution in producing or acquiring the contributed property are not deductible and are not a part of the cost of goods sold. Similarly, to the extent that costs and expenses incurred in a prior taxable year in producing or acquiring the contributed property are reflected in the cost of goods sold in the year of contribution, cost of goods sold must be reduced by such costs and expenses. Transfers of property to an organization described in section 170(c) which bear a direct relationship to the taxpayer's business and which are made with a reasonable expectation of financial return commensurate with the amount of the transfer may constitute allowable deductions as trade or business expenses rather than as charitable contributions. See section 172 and the regulations thereunder.

Rev. Proc. 66-49, 1966-2 Cum. Bull. 1257:

A procedure to be used as a guideline by all persons making appraisals of donated property for Federal income tax purposes.

Section 1. Purpose.

The purpose of this procedure is to provide information and guidelines for taxpayers, individual appraisers, and valuation groups relative to appraisals of contributed property for Federal income purposes. The procedures outlined are applicable to all types of noncash property for which an appraisal is required such as real property, tangible or intangible personal property, and securities. These procedures are also appropriate for unique properties such as art objects, literary manuscripts, antiques, etc., with respect to which the determination of value often is more difficult.

Section 2. Law and Regulations.

.01 Numerous sections of the Internal Revenue Code of 1954, as amended, give rise to a determination of value for Federal tax purposes; however, the significant section for purposes of this Revenue Procedure is section 170, Charitable, Etc., Contributions and Gifts.

.02 Value is defined in section 1.170-1(c) of the Income Tax Regulations as follows:

* * *. The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts. * * *

.03 This section further provides that:

* * *. If the contribution is made in property of a type which the taxpayer sells in the course of his business, the fair market value is the price which the taxpayer would have received if he had sold the contributed property in the lowest usual market in which he customarily sells, at the time and place of contribution (and in the case of a contribution of goods in quantity, in the quantity contributed). * * *

.04 As to the measure of proof in determining the fair market value, all factors bearing on value are relevant including, where pertinent, the cost, or selling price of the item, sales of comparable properties, cost of reproduction, opinion evidence and appraisals. Fair market value depends upon value in the market and not on intrinsic worth.

.05 The cost or actual selling price of an item within a reasonable time before or after the valuation date may be the best evidence of its fair market value. Before such information is taken into account, it must be ascertained that the transaction was at arm's length and that the parties were fully informed as to all relevant facts. Absent such evidence, even the sales price of the item in question will not be persuasive.

.06 Sales of similar properties are often given probative weight by the courts in establishing fair market value. The weight to be given such evidence will be affected by the degree of similarity to the property under appraisal and the proximity of the date of sale to the valuation date.

.07 With respect to reproductive cost as a measure of fair market value, it must be shown that there is a probative correlation between the cost of reproduction and fair market value. Frequently, reproductive cost will be in excess of the fair market value.

.08 Generally, the weight to be given to opinion evidence depends on its origin and the thoroughness with which it is supported by experience and facts. It is only where expert opinion is supported by facts having strong probative value, that the opinion testimony will in itself be given appropriate weight. The underlying facts must corroborate the opinion; otherwise such opinion will be discounted or disregarded.

.08 Generally, the weight to be given to opinion evidence depends on its origin and the thoroughness with which it is supported by facts having strong probative value, that the opinion testimony will in itself be given appropriate weight. The underlying facts must corroborate the opinion; otherwise such opinion will be discounted or disregarded.

.09 The weight to be accorded any appraisal made either at or after the valuation date will depend largely upon the competence and knowledge of the appraiser with respect to the property and the market for such property.

SEC. 3. Appraisal Format.

.01 When it becomes necessary to secure an appraisal in order to determine the values of items for Federal income tax purposes, such appraisals should be obtained from qualified and reputable

sources, and the appraisal report should accompany the return when it is filed. The more complete the information filed with a tax return the more unlikely it will be that the Internal Revenue Service will find it necessary to question items on it. Thus, when reporting a deduction for charitable contributions on an income tax return, it will facilitate the review and the acceptance of the returned values if any appraisals which have been secured are furnished. The above-mentioned regulations prescribe that support of values claimed should be submitted and a properly prepared appraisal by a person qualified to make such an appraisal may well constitute the necessary substantiation. In this respect, it is not intended that all value determinations be supported by formal written appraisals as outlined in detail below. This is particularly applicable to minor items of property or where the value of the property is easily ascertainable by methods other than appraisal.

.02 In general, an appraisal report should contain at least the following:

- (1) A summary of the appraiser's qualifications.
- (2) A statement of the value and the appraiser's definition of the value he has obtained.
- (3) The bases upon which the appraisal was made, including any restrictions, understandings, or covenants limiting the use or disposition of the property.
- (4) The date as of which the property was valued.
- (5) The signature of the appraiser and the date the appraisal was made.

.03 An example of the kind of data which should be contained in a typical appraisal is included below. This relates to the valuation of art objects, but a similar detailed breakdown can be outlined for any type of property. Appraisals of art objects, paintings in particular, should include:

- (1) A complete description of the object, indicating the size, the subject matter, the medium, the name of the artist, approximate date created, the interest transferred, etc.

(2) The cost, date, and manner of acquisition.

(3) A history of the item including proof of authenticity such as a certificate of authentication if such exists.

(4) A photograph of a size and quality fully identifying the subject matter, preferably a 10" x 12" or larger print.

(5) A statement of the factors upon which the appraisal was based, such as:

(a) Sales of other works by the same artist particularly on or around the valuation date.

(b) Quoted prices in dealers' catalogs of the artist's works or of other artists of comparable stature.

(c) The economic state of the art market at or around the time of valuation, particularly with respect to the specific property.

(d) A record of any exhibitions at which the particular art object had been displayed.

(e) A statement as to the standing of the artist in his profession and in the particular school or time period.

.04 Although an appraisal report meets these requirements, the Internal Revenue Service is not relieved of the responsibility of reviewing appraisals to the extent deemed necessary.